

BEFORE THE FEDERAL ELECTION COMMISSION

2005 JUN 29 A 11:48

MUR 5333

SENSITIVE

In the Matter of)

Winterfox, LLC)

Winterhawk Enterprises, LLC)

Evan Bybee)

Nicail Gomm¹)

Taige Bybee)

Tamra Bybee)

Kara Davis)

Brenn Bybee)

Dennis Gay)

Bodee Gay)

Gina Gay)

Kimm Humphreys²)

Haley Gay)

GENERAL COUNSEL'S REPORT #2

I. ACTIONS RECOMMENDED

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4. Take no further action regarding the reason to believe findings that Winterfox and Winterhawk violated 2 U.S.C. §§ 441b(a) and 441f;

5. Take no further action regarding the reason to believe findings that Evan Bybee and Dennis Gay violated 2 U.S.C. § 441b(a);

6. Take no further action regarding the reason to believe findings that Taige Bybee and Gina Gay violated 2 U.S.C. §§ 441a(a)(1)(A) and 441f;

7. Take no further action regarding the reason to believe findings that Tamra Bybee, Nicail Gomm, Kara Davis, Brenn Bybee, Bodee Gay, Haley Gay and Kimm Humphreys violated 2 U.S.C. § 441f;

¹ This respondent was identified in the complaint and the First General Counsel's Report as Nicail Bybee

² This respondent was identified in the complaint and the First General Counsel's Report as Kim Gay

8. Find no reason to believe that Nicaïl Gomm, Tamra Bybee, Bodee Gay or Kimm Humphreys violated 2 U.S.C. § 441a(a)(1)(A);

9. Close the file as to Taige Bybee, Tamra Bybee, Nicaïl Gomm, Kara Davis, Brenn Bybee, Gina Gay, Bodee Gay, Haley Gay and Kimm Humphreys; and

10. Approve the appropriate letter.

II. BACKGROUND

Winterfox and Winterhawk are limited liability companies ("LLCs") that wrote contribution checks to John Swallow for Congress ("the Committee") in the amounts of \$4,000 and \$5,000.³

These contributions were attributed to the eleven individuals listed in the table below.

Check drawn on account	Check date	Amount	Attributed individuals (\$1,000 each)
Winterfox	3/28/02	\$5,000	Evan Bybee, Tamra Bybee, Taige Bybee, Kara Davis, Nicaïl Bybee
Winterfox	6/28/02	\$5,000	Evan Bybee, Tamra Bybee, Taige Bybee, Nicaïl Bybee, Brenn Bybee
Winterhawk	3/29/02	\$4,000	Dennis Gay, Gina Gay, Bodee Gay, Kim Gay
Winterhawk	6/21/02	\$5,000	Dennis Gay, Gina Gay, Bodee Gay, Kim Gay, Haley Gay

These LLC contributions were analyzed in the First General Counsel's Report in this matter as either corporate or partnership contributions.⁴ See 11 C.F.R. § 110.1(g). The Commission found reason to believe that:

- Winterfox and Winterhawk each violated 2 U.S.C. §§ 441b(a), 441a(a)(1)(A) and 441f;
- Evan Bybee and Dennis Gay, identified as the LLC managers, each violated 2 U.S.C. § 441b(a);
- Evan Bybee, Taige Bybee, Dennis Gay and Gina Gay, who appeared to be the only LLC members, each violated 2 U.S.C. §§ 441a(a)(1)(A) and 441f; and

³ Winterfox and Winterhawk are related entities in that each owns nearly 50% of Basic Research LLC, a manufacturer of dietary supplements. Winterfox and Winterhawk and the eleven related individual respondents share the same counsel and filed joint responses in this matter

⁴ See pages 16-24 of the First General Counsel's Report

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- Tamra Bybee, Nicaïl Bybee, Kara Davis, Brenn Bybee, Bodee Gay, Kim Gay and Haley Gay, who did not appear to be LLC members, each violated 2 U.S.C. § 441f.

Finally, the Commission took no action with respect to Nicaïl Bybee, Tamra Bybee, Bodee Gay or Kim Gay regarding the allegation in the complaint that they violated 2 U.S.C. § 441a(a)(1)(A).⁵ This Office conducted an informal investigation of the LLCs' contributions and the roles of LLC members and managers, the results of which are set forth below along with our recommendations for bringing this portion of MUR 5333 to a conclusion.⁶

III. ANALYSIS

A. The Winterfox and Winterhawk contributions are partnership contributions

Winterfox and Winterhawk have documented their status as LLCs that file with the Internal Revenue Service ("IRS") as partnerships, and thus their contributions are treated as contributions from a partnership pursuant to 11 C.F.R. § 110.1(e). *See* 11 C.F.R. § 110.1(g)(2). Partnership contributions are attributed to both the partnership and to the partners. *See* 11 C.F.R. § 110.1(e). Accordingly, we analyze the Winterfox and Winterhawk contributions below in section III.B as contributions by the partnerships and in section III.C as contributions by the partners.

B. Contributions Attributed to Partnerships

As partnership contributions, the Winterfox and Winterhawk contributions are subject to the contribution limits. *See* 11 C.F.R. § 110.1(e) (a contribution by a partnership shall not exceed the Act's limitations on contributions). The limit on contributions to candidate

⁵ The complaint in this matter alleged, *inter alia*, that these four individuals, along with Evan Bybee, Taige Bybee, Dennis Gay, Gina Gay and numerous other individuals, made excessive contributions to the Committee during the 2002 election cycle. The complaint made no allegations regarding the LLCs, which the Commission internally-generated as respondents based on responses to the complaint and public information.

⁶ In addition to Winterfox and Winterhawk and the related individuals addressed in this Report, there remain twelve other open respondents in this matter: Robert B. Lichfield and nine related individuals with the last name Lichfield and the recipient Committee and its treasurer. We will address these respondents in a forthcoming report.

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committees in effect at the time of the LLCs' contributions was \$1,000 per election. 2 U.S.C. § 441a(a)(1)(A). Winterfox's \$5,000 contributions to the Committee in connection with the 2002 convention election and primary election, respectively, were both in excess of that limit. Similarly, Winterhawk's \$4,000 and \$5,000 contributions to the Committee in connection with the 2002 convention election and general election, respectively, were both in excess of the limit.⁷

C. Contributions Attributed to Partners

The contribution limits applicable to Winterfox and Winterhawk also apply to the individual partners to whom the contributions are attributed. *See* 2 U.S.C. § 441a(a)(1)(A); 11 C.F.R. § 110.1(e). These limits are enforced by requirements in the Commission's regulations that partnership contributions are attributed to 1) each partner in direct proportion to his or her share of the partnership profits, or 2) in a non pro rata fashion by agreement of the partners, as long as only the profits of the partners to whom the contribution is attributed are reduced, and these partners' profits are reduced in proportion to the contribution attributed to each of them. 11 C.F.R. § 110.1(e)(1) and (2). *See also* Advisory Opinion 1980-67.

At the time of the Commission's reason to believe findings, the available information indicated that the only members of Winterfox were Evan Bybee and Taige Bybee, and that the only members of Winterhawk were Dennis Gay and Gina Gay.⁸ It appeared that the LLCs' contributions, therefore, could only be attributed to these individuals, and not to the seven other individuals to whom the contributions were attributed. The two \$5,000 Winterfox contributions to the Committee split only two ways indicated that Evan Bybee and Taige Bybee had each

⁷ The LLCs' responses do not address these excessive contributions

⁸ This information was obtained from the Utah Department of Commerce

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1 contributed \$2,500 in connection with the convention election and \$2,500 in connection with the
2 primary election, in excess of the contribution limit. *See* 2 U.S.C. § 441a(a)(1)(A). Similarly,
3 the Winterhawk contributions of \$4,000 and \$5,000 split only two ways indicated that Dennis
4 Gay and Gina Gay had each contributed \$2,000 in connection with the convention election and
5 \$2,500 in connection with the general election, in excess of the contribution limit. *See id.*

6 Winterfox and Winterhawk have now documented that each of the eleven attributed
7 contributors is in fact a member of the respective LLC and owns a percentage of it. Further,
8 Winterfox has three other members who are not attributed contributors, and Winterhawk has one
9 other member who is not an attributed contributor. Accordingly, the LLC contributions are not
10 attributed to each partner in direct proportion to his or her share of the profits. *See* 11 C.F.R.
11 § 110.1(e)(1). Instead, they assert, in essence, that the section 110.1(e)(2) non pro rata option
12 applies, whereby pursuant to an agreement of the partners, the profits of the contributing partners
13 are reduced in proportion to their contributions. We apply these requirements in turn.

14 **1. Agreement of the partners**

15 The managers of Winterfox and Winterhawk, Evan Bybee and Dennis Gay, respectively,
16 each stated in an affidavit that they agreed with the other contributing members to make the
17 partnership contributions.⁹ Messrs. Bybee and Gay affirmed that thereafter they wrote
18 contribution checks on the LLCs' accounts and listed on the checks the names of those
19 individual LLC members who were contributing \$1,000 each. Subsequently, in the case of three
20 out of the four LLC checks at issue, the attributed contributors signed forms provided by the
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⁹ The affidavits specifically describe the other contributing members as the spouses of Messrs. Bybee and Gay and their adult children. Affidavit of Evan Bybee at ¶¶ 5 and 7; Affidavit of Dennis Gay at ¶¶ 5 and 7.

1 Committee asking the contributors to confirm that personal funds were used.¹⁰ Although
2 respondents have not provided contemporaneous documentation of partner agreements, the
3 available information shows an intention on the part of the contributing members to give \$1,000
4 each, within the contribution limit. See 2 U.S.C. § 441a(a)(1)(A). Moreover, it does not appear
5 that respondents put themselves in a more advantageous position by claiming there were
6 agreements; indeed, application of the section 110.1(e)(1) pro rata rule would actually reduce the
7 amounts attributed to each of the contributing partners, including the managing partners.¹¹

8 2. Contributing partners' profits reduced

9 Despite such apparent agreements among the contributing members attributing the LLC
10 contributions among several members, at the time of the contributions only one member of each
11 LLC had his profits reduced. The LLCs state that each member's attributed contribution was
12 supposed to be drawn on the member's capital account in the LLC. By what the LLCs describe
13 as errors by their accountants, however, the amount of each LLC contribution check was drawn
14 against only a single member's capital account. Specifically, Winterfox mistakenly attributed
15 the entire amount of its two \$5,000 contribution checks as a \$10,000 draw on the capital account
16 of Evan Bybee. Similarly, Winterhawk mistakenly attributed the entire amount of its \$4,000 and
17 \$5,000 contribution checks as a \$9,000 draw on the capital account of Dennis Gay. This mistake

¹⁰ The Committee's forms stated, *inter alia*.

The strict Federal Election Commission regulations [prohibit] making contributions on behalf of someone else to federal election campaigns. We must refund this money to you within thirty (30) days unless you can establish in writing that the contribution came from personal funds of a corporate drawing account, such as a draw against salary, wages, dividends, etc. Please confirm that such was indeed the case with this check by signing below

The letters provide fields for the dated signature, occupation and employer of the attributed contributors. The completed fields contain signatures, occupations and employers. See the First General Counsel's Report at pages 17-19

¹¹ By contrast, in MUR 5279 (Kushner), the managing partner attempted to use section 110.1(e)(2) to evade the contribution limits by attributing contributions to other partners without their consent and attributing little or none of the contributions to himself

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1 was reflected on Messrs. Bybee and Gay's 2002 tax returns, specifically, their Schedule K-1s
2 associated with the LLCs' Form 1065 partnership filings.¹² The LLCs provided an affidavit
3 from their accountant describing these attributions as a mistake and stating that the draws would
4 be reclassified in order to take into account the LLC members indicated on the LLCs' checks.
5 Affidavit of David T. Posey at ¶ 14. Upon further questioning by this Office, the LLCs
6 documented that the error will be corrected on the members' 2004 Schedule K-1s by adding to
7 the capital accounts of Evan Bybee and Dennis Gay and subtracting from the capital accounts of
8 the other nine contributors. The net effect will be that each attributed contributor will have his or
9 her capital account reduced by the amount of their contributions.

10 As described, the LLCs misattributed the contributions, and so Evan Bybee and Dennis
11 Gay effectively made excessive contributions and contributions in the names of the other LLC
12 members. *See* 2 U.S.C. §§ 441a(a)(1)(A) and 441f.

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16 In view of the information that these violations
17 resulted from accountants' errors, that the eleven LLC members all intended to contribute to the
18 Committee, and that the attribution mistake is being corrected, this Office is not recommending:
19 1) that the Commission pursue these violations as knowing and willful; or 2) that the
20 Commission further pursue the nine LLC members who served as conduits. *See* section III.E
21 below.
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¹² Generally, a partnership uses IRS Schedule K-1 to report to the IRS a partner's share of the partnership's income, deductions and credits, among other things. *See* <http://www.irs.gov/pub/irs-pdf/i1065sk1.pdf>

D.

E. No Further Action Recommendations

In light of the LLCs' status as partnerships rather than corporations, this Office recommends that the Commission take no further action regarding the reason to believe findings that Winterfox and Winterhawk violated 2 U.S.C. § 441b(a). Accordingly, managers of Winterfox and Winterhawk, Evan Bybee and Dennis Gay, respectively, have not consented to corporate contributions. Therefore, this Office recommends that the Commission take no further action regarding the reason to believe findings that Evan Bybee and Dennis Gay violated 2 U.S.C. § 441b(a).

1 In addition, because each attributed contributor for the LLCs' contributions is a member
2 of the LLC, neither LLC made contributions in the names of persons who are not members.
3 Thus, this Office recommends that the Commission take no further action regarding the reason to
4 believe findings that Winterfox and Winterhawk violated 2 U.S.C. § 441f. As for the attribution
5 of the LLCs' contributions, we recommend that the Commission take no further action regarding
6 the reason to believe findings that Taige Bybee and Gina Gay each violated 2 U.S.C.
7 §§ 441a(a)(1)(A) and 441f, and take no further action regarding the reason to believe findings
8 that Tamra Bybee, Nicaïl Gomm, Kara Davis, Brenn Bybee, Bodee Gay, Haley Gay and Kimm
9 Humphreys each violated 2 U.S.C. § 441f. Finally, this Office recommends that the Commission
10 find no reason to believe that Nicaïl Gomm, Tamra Bybee, Bodee Gay or Kimm Humphreys
11 violated 2 U.S.C. § 441a(a)(1)(A), as none of these individuals made excessive contributions as
12 alleged in the complaint.

13 **IV. RECOMMENDATIONS**

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18 2.
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22 3.
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24 4. Take no further action regarding the reason to believe findings that Winterfox, LLC
25 and Winterhawk Enterprises, LLC violated 2 U.S.C. §§ 441b(a) and 441f.
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27 5. Take no further action regarding the reason to believe findings that Evan Bybee and
28 Dennis Gay violated 2 U.S.C. § 441b(a).
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30 6. Take no further action regarding the reason to believe findings that Taige Bybee and
31 Gina Gay violated 2 U.S.C. §§ 441a(a)(1)(A) and 441f.
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7. Take no further action regarding the reason to believe findings that Tamra Bybee, Nicaïl Gomm, Kara Davis, Brenn Bybee, Bodee Gay, Haley Gay and Kimm Humphreys violated 2 U.S.C. § 441f.
8. Find no reason to believe that Nicaïl Gomm, Tamra Bybee, Bodee Gay or Kimm Humphreys violated 2 U.S.C. § 441a(a)(1)(A).
9. Close the file as to Taige Bybee, Tamra Bybee, Nicaïl Gomm, Kara Davis, Brenn Bybee, Gina Gay, Bodee Gay, Haley Gay and Kimm Humphreys.
10. Approve the appropriate letter.

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General Counsel

Lawrence L. Calvert Jr.
Deputy Associate General Counsel
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6/28/05
Date

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